No. 91-1306

In The

# Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

*Petitioner,*

v.

GUY W. OLANO, JR., and RAYMOND M. GRAY,

*Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## BRIEF OF RESPONDENT RAYMOND M. GRAY

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Since the beginning of the system of trial by jury as we know it, the rule has always been that the deliberations of the persons charged with the responsibility of determining a defendant's fate are private and secret. As Judge Irving Kaufman explained the rule:

> The American jury system, Alexis DeTocqueville observed, is 'as direct and as extreme a consequence of the sovereignty of the people a universal suffrage.' Accordingly, the sanctity of the jury room is among the basic tenets of our system of justice.

*Attridge v. Cencorp Division*, 836 F.2d 113, 113-114 (2d Cir. 1987).

That rule was violated in this case. The violation was neither minor nor technical. A person who was not a juror, and was not responsible for deciding the case, remained with the deliberating jurors throughout the period of their deliberations, from the moment they started, until the time they reached a decision some four days later. That the unauthorized person was an alternate juror does not render the person any less an interloper or the violation of the rule any less significant. If anything, the person's status as an alternate juror, as one prepared to step in at any moment (according to the district court's instructions), and as one who been an equal with the jurors for three months of trial, only increases significantly the probability that the unauthorized person had an effect upon the deliberations.

The Court of Appeals correctly determined that there was an error in this case, and the Court of Appeals also

correctly concluded that given the specific nature of the error which occurred, there was a reasonable probability that the error was prejudicial. Pet. App. 24a, 29a. Based on its conclusion that the specific nature of the Rule 24(c) error made it inherently prejudicial and that it affected a substantial right of the respondents, the Court of Appeals exercised its authority under Fed. R. Crim. P. 52(b) to recognize the error in the absence of a contemporaneous objection. Pet. App. 29a-30a & n.23.

As to respondent Gray, it was not necessary for the Court of Appeals to act pursuant to the plain error doctrine of Rule 52(b) because Gray's counsel objected to the error. Assuming that the objection was insufficient, however, and that Respondent Gray's claim must be reviewed under Rule 52(b), the Court of Appeals' ruling was still correct. The Court found plain error because the nature of the error made it presumptively prejudicial, that decision is in accordance with this Court's prior decisions concerning the application of the plain error doctrine of Rule 52(b).

Petitioner argues that the defect in the Court of Appeals' opinion is that it adopts a *"per se"* approach to plain error. Under Rule 52(b) and creates a rule of automatic reversal to Rule 24(c) violations. *See* Petitioner's Brief 16-17 (hereafter "Pet. Brf.") this characterization of the Court of Appeals' is not accurate.

Petitioner's analysis of the opinion is flawed because it assumes that since the Court of Appeals did not make a finding of "actual prejudice," the Court therefore adopted a *"per se"* approach to plain error. Pet. Brf. 17-19. While it is correct that the Court of Appeals did not make a



finding of "actual prejudice," the absence of such a finding does not mean the Court of Appeals followed a *per se* approach to plain error in all cases. To the contrary, that Court determined that the particular error which occurred in this case was inherently and presumptively prejudicial, not that every other Rule 24(c) violation would be plain error in every case.

Moreover, the petitioner errs in claiming that inherently prejudicial errors never qualify for plain error review. An error which is inherently prejudicial can qualify as plain error under Rule 52(b), as the Court of Appeals determined here. Finally, even if the Ninth Circuit's determination that the error here was inherently prejudicial is insufficient to sustain the plain error ruling, the government should bear the burden of proving beyond a reasonable doubt, that the acknowledged prejudicial error was harmless.

The petitioner's position is flawed on policy grounds as well. Given the nature of the error which occurred here, a finding of actual prejudice or specific prejudice, which the petitioner argues is necessary, is not possible. The most that anyone can honestly say about the error is limited to its probable or likely effect. Under the petitioner's view, this means errors which are inherently prejudicial can never under any circumstances be recognized as plain error, because the finding of specific prejudice which the petitioner says is required can never be made. Hence, in advocating this position, petitioner creates exactly what it says is inappropriate – a *per se* approach to plain error (albeit, one which means that the

error is *per se* never plain error). Moreover, the petitioner's approach would have the illogical result of assuring that some of the most serious errors, "inherently prejudicial" errors, could never be corrected without a contemporaneous objection, while less serious errors could be so corrected. Similarly, if the petitioner's position were adopted, its effect would be to insure yet another round to litigation – a defendant whose trial counsel did not object to an inherently prejudicial error, and who because of that failure to object is not able to obtain relief through the plain error doctrine on direct appeal, has an airtight ineffective assistance of counsel claim. The only way to avoid such a result is to recognize, as the Court of Appeals did here, that some inherently prejudicial errors can be recognized and corrected on direct appeal as plain error.

## ARGUMENT

### I.

### RESPONDENT GRAY OBJECTED TO THE RULE 24(c) VIOLATION AND HIS CONVICTION SHOULD BE REVERSED WITHOUT RELIANCE ON PLAIN ERROR

On May 26 the district court first suggested the idea that "the alternates go in but not participate, but just . . . sit in on [the jury] deliberations." J.A. 79, Tr. 10,399. In making the suggestion, the court stated "if there is even one person who doesn't like it we won't do it, . . . " *Ibid.* On May 27 the district court again raised the suggestion and respondent Gray's attorney stated unequivocally that he did not want the alternates to be



allowed to sit in on the deliberations. J.A. 82, Tr. 10,609 ("We would ask they not.") The following day, May 28, the district court inexplicably expressed its understanding that the lawyers had agreed to allow the alternates to deliberate:

> "Do I understand that the defendants now – its hard to keep up with you Counsel . . . You do all agree that all fourteen deliberate? Okay. Do you want me to instruct the two alternates not to participate in the deliberations?"

The only response was from counsel for co-defendant Hilling:

> That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations. J.A. 86, Tr. 10,736.

Thus, the only time that respondent Gray's counsel spoke on the court's suggested procedure, he clearly asked that the alternates *not* be allowed to go into the jury room during the deliberations. Respondent Gray's counsel objected to the Rule 24(c) error.

It is true that when the question was raised again the following day, Gray's counsel did not object a second time. Nor did he restate his position opposing the procedure. His silence, however, does not waive his earlier objection since he clearly stated the action he thought the district judge should take the first time. *See United States v. Pirovolos,* 844 F.2d 415, 424, n.8 (7th Cir. 1988); *United States v. Morgan,* 581 F.2d 933, 939, n.16 (D.C. Cir. 1978). This is particularly true given the district court's initial

representation that if even one person objected, the procedure would not be followed. Even though Gray's counsel had made his objection to the procedure obvious, the court continued to go forward with the procedure that it, alone, suggested.

This conclusion – that counsel's silence the second time, after making his position known the first time, did not waive his objection – is further supported by the ambiguous nature of the record. Although the court stated "[y]ou do all agree that all fourteen deliberate?", it is not only unclear whom the court was addressing, but the court's statement was incorrect – no one agreed that "all fourteen deliberate." At a minimum, given the deviation from the explicit command of Fed. R. Crim. P. 24(c) that the court was contemplating, and given that Gray's counsel had previously stated his objection to the deviation, the court should have specifically inquired whether Gray's counsel was withdrawing his previous objection.

Since respondent Gary objected to the Rule 24(c) error, his claim should be reviewed under the harmless error standard of Fed. R. Crim. P. 52(a) rather than the plain error standard of Rule 52(b). *See United States v. Morgan*, 581 F.2d at 939, n.16. Because the error which occurred was inherently prejudicial (*See* section II.A.3., *post*), respondent Gray is entitled to a reversal because an inherently prejudicial error cannot be harmless.[1]

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[1] Even if this Court were to determine that the Rule 24(c) error which occurred here was not inherently prejudicial, the burden would then be on the government to demonstrate that the error was harmless. Moreover, since the error which occurred here was of constitutional magnitude, the government would have to prove the error was harmless beyond a reasonable doubt. *See Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (potential influence on deliberating jurors by bailiff denied defendant his constitutional right to be an impartial jury); *Chapman v. California*, 386 U.S. 18, 24 (1967) (constitutional error requires reversal unless prosecution can demonstrate that the error was harmless beyond a reasonable doubt). *See* Section II.B.3., *post*. As discussed below, the government cannot meet that burden in this case. *Id.*



*See United States v. Gomez*, 490 U.S. 858, 876 (1989) (magistrate jury selection is inherently prejudicial and cannot be harmless error).

## II.

## THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE RULE 24(c) VIOLATION THAT OCCURRED IN THIS CASE WAS SUBJECT TO REVIEW AS "PLAIN ERROR" UNDER RULE 52(b)

Petitioner acknowledges that even with full and personal consent of everyone involved, the failure to discharge the alternate jurors once the deliberations began was error, as it violated the mandatory provision of Rule 24(c). Pet. Brf. 10. The Rule 24(c) violation which occurred here, however, is much more serious – the district court not only failed to discharge the alternates, but the alternates were present in the jury room during deliberations. While one of the two alternates left during the deliberations, the other alternate remained until the conclusion of the deliberations.

The Court of Appeals concluded that the error amounted to plain error under Rule 52(b). The petitioner's quarrel with that conclusion is two fold. First, petitioner asserts that the finding that an error is inherently prejudicial does not bring the error within rule 52(b) because it constitutes a *per se* approach to plain error. Second, even if it is true that an inherently prejudicial error can, on that basis, constitute plain error within the scope of Rule 52(b), the error which occurred here was not inherently prejudicial. Petitioner is wrong on both counts.

### A. The Court of Appeals Correctly Concluded That The Specific Type Of Rule 24(c) Error Which Occurred In This Case Was Inherently And Presumptively Prejudicial

#### 1. The Types of Rule 24(c) Error

In determining whether the Court of Appeals' decision that the Rule 24(c) error in this case was inherently prejudicial was based on an impermissible *per se* approach to plain error, it is necessary to understand the types of Rule 24(c) error that have been recognized. A Rule 24(c) error may take a variety of different forms. First, it is error if the alternate jurors are not discharged even if they are kept apart from the regular jurors during deliberations. *See, e.g., United States v. Rubio,* 727 F.2d 786, 799 (9th Cir. 1983). Second, it is error to substitute an alternate juror (who has not been discharged but not allowed to deliberate) for a regular juror after deliberations have commenced. *See, e.g., United States v. Kaminski,* 692 F.2d 505, 518 (8th Cir. 1982); *Leser v. United States,* 358



F.2d 313, 317 (9th Cir.), *petition for cert. dismissed* 385 U.S. 802 (1966). Third, it is error if the alternate is not discharged and instead made into a regular juror when deliberations commence, thereby effectively increasing the size of the jury. *See, e.g., United States v. Reed,* 790 F.2d 208, 210 (2d Cir.) *cert. denied* 479 U.S. 954 (1986). Fourth, the trial court may err by failing to discharge an alternate juror and allowing the alternate to be present during the deliberations of the regular jurors, even though the alternate is not charged with responsibility for deciding the case. *See, e.g., United States v. Beasley,* 464 F.2d at 469. In the present case, it was the fourth type of error which occurred; the alternate jurors were not discharged and were then allowed to be present during the deliberations of the regular jurors.

#### 2. The Nature Of The Prejudice

The type of Rule 24(c) error which occurred in this case is different from and more serious than, the other types of Rule 24(c) errors because of its potential for prejudice. That prejudice is any effect on the deliberations of the jurors caused by the presence of the unauthorized persons. Such an effect has universally been recognized to constitute prejudice, and given our system of trial by jury, a more serious type of prejudice can hardly be imagined. *See Parker v. Gladden,* 385 U.S. at 364-365; *Turner v. Louisiana,* 379 U.S. 466, 472-473 (1965). The prejudice is also the lack of secrecy and the breach of the jealously guarded sanctity of juror deliberations. *See United States v. Watson,* 669 F.2d 1374, 1390-91 (11th Cir. 1982); *United States*

*v. Phillips*, 664 F.2d 971, 995 (5th Cir. 1981) (discussing *United States v. Lamb*, 529 F.2d 1153, 1160 (9th Cir. 1975) (*en banc*) (Wright, J. dissenting).

Petitioner impliedly assumes, without citing support, that prejudice in the context of the present case means that the presence of the alternate jurors "fundamentally altered the jury's deliberative process." Pet. Brf. at 23. Using that as the standard, petitioner asserts that the alternates could not have had this effect, especially since they sat through the trial and heard the evidence. Indeed, petitioner suggests that there was hardly error at all, noting that the "alternates were not technically members of the jury" but were very much like the jurors. Pet. Brf. at 22-23.

The petitioner has misperceived both the error and the prejudice. The problem here is that *no one* is allowed inside the jury room during deliberations under any circumstances except the persons who have responsibility for deciding the case. *See, e.g., United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978); *cf. United States v. Pittman*, 449 F.2d 1284, 1286 (9th Cir. 1971). There are no degrees of membership in a jury; to call the difference "technical" under any circumstances is to miss the point entirely. Judges, lawyers and litigants do not spend countless hours to determine who will "technically" be a member of the jury. The parties are entitled to have the case decided by the individuals chosen and designated for that purpose. As noted above, the prejudice is that the jury's deliberations may have been influenced by an improper source, a person not authorized to be in the jury room, and a person not responsible for deciding the case.



*See Parker v. Gladden*, 385 U.S. at 364-365; *Turner v. Louisiana*, 379 U.S. at 472; *see also United States v. Essex*, 734 F.2d 832, 845 (D.C. Cir. 1984). Influence, not outcome, is the prejudice. *Parker v. Gladden*, 385 U.S. at 365. Lack of secrecy is the prejudice. *State v. Cuzick*, 85 Wash. 2d 146, 149, 536 P.2d 288 (1975). Although it is admittedly not possible on the present record to know whether the unauthorized persons had such an effect, it is difficult to believe that a person could remain inside a room with twelve other people for up to four days, who are discussing what they had all spent the last three months of their lives hearing about together, and have no effect.

### 3. The Type Of Rule 24(c) Error Which Occurred In This Case Was Presumptively And Inherently Prejudicial

The Court of Appeals, in concluding that the error was subject to review as plain error under Rule 52(b), ruled that the error was inherently or presumptively prejudicial because of the particular features of the type of Rule 24(c) error which occurred here: "We conclude that permitting unauthorized persons *to be present in the jury room while the jury is deliberating*, in violation of Rule 24(c), is inherently prejudicial." Pet. App. 28a (emphasis added). Thus, contrary to the assertion of petitioner, the Court of Appeals did not rule that a violation of Rule 24(c) is always inherently prejudicial or automatic reversible error.

Rather, the Court of Appeals carefully delineated the numerous ways in which the presence of unauthorized persons in the jury room, including alternate jurors, can affect the deliberations. Pet. App. 28a-29a. The attitude of the unauthorized persons, their facial expressions and their body language could all influence the deliberations. Common human experience suggests that being observed silently by another can affect the process of deliberation and consultation. Even the decision to depart suddenly, as one of the two alternates did in this case, may have an effect on the deliberations. *See United States v. Lamb*, 529 F.2d at 1160 (Wright, J., dissenting) (citing *United States v. Beasley*, 464 F.2d at 470).

The likelihood and potential for prejudice in this case was increased by the manner in which the alternates were chosen and by the instructions they were given when told they could stay for the deliberations.

First, no alternates were chosen or designated until the jury was about to retire to deliberate. J.A. 20-23, 81 Tr. 17-21, 10,608. Throughout the three-month trial, the jurors who were ultimately designated as alternates were equal to the jurors who ultimately became the deliberating jury. This equality during the trial could only have increased the effect that the alternates would have upon the deliberating jurors, since it would foster a sense of equality during deliberations also.

Second, in telling both the regular jurors and the alternates that the alternates could stay for the deliberations, the trial judge explained: " . . . we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we



want you to be able to step in having heard the deliberations." J.A. 89-90, Tr. 10,802. Once again, this explanation could have only increased the potential that the alternate jurors would have an effect on the deliberations of the regular jurors, since everyone thought that the alternates could "step in" in any time.[2]

Third, the district court's instruction that the alternates should not participate in the deliberations was perfunctory and limited. The only instruction given to the regular jurors and the alternates about the role of the alternates was the following: "But what we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the alternates must not participate in the deliberations. It's going to be hard. . . . " J.A. 89, Tr. 10,802. The jurors were not told to avoid facial expressions, body language or the like which would communicate their attitude or beliefs. In fact, the district court never defined what it meant "not to participate," other than to essentially suggest that a violation of this provision would be understandable. The strong, specific and unequivocal commands from the trial court that one would expect in such a circumstance are completely absent.

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[2] The district court's explanation was wrong – the alternate jurors could not have substituted for a regular juror as it is prohibited by Rule 23 and Rule 24. Pet. App. 24a *citing* Advisory Committee Notes to 1983 Amendment to Rule 23; C. Wright, *Federal Practice and Procedure*, § 388, at 393 & n.26 (2d. ed. 1982 & Supp. 1992).

Based on all of these factors, the Court of Appeals concluded that it was reasonably probable that the error which occurred here would result in prejudice (*i.e.*, that the deliberations of the jurors would be affected by the unauthorized person(s)):

> Given the difficulty of ascertaining the numerous, and often subtle, ways alternate jurors can impinge upon the privacy of the jury, given the potential that their presence may in fact affect the deliberating jurors' ultimate determination if they are allowed to be present, and given the emphatic adoption of the *Virginia Erection* principles by the Advisory Committee of the Federal Rules, we conclude that the district court's deviation from Rule 24(c) without the express, personal consent of the defendants was inherently prejudicial.

Pet. App. 29a.

As the Court of Appeals accurately and candidly acknowledged, the very nature of the error here precludes a finding of actual prejudice or specific prejudice. Pet. App. 24a, 28a. Once the error occurs and the jurors have been discharged, there is no practical way to make a determination of actual or specific prejudice. Indeed, the only way even to attempt to make a finding of specific or actual prejudice would be to violate the rule which prohibits examining jurors as to the process of deliberation and the factors influencing their decision. *See* F.R. Evid. 606(b); *McDonald v. Pless*, 238 U.S. 264 (1914); *Attridge v. Cencorp Division*, 836 F.2d at 113-114; *United States v. Brooks*, 677 F.2d 907, 913-914 (D.C. Cir. 1982) (per curiam); *United States v. Crosby*, 294 F.2d 928, 949 (2d Cir. 1961).



The Court has recognized that where it is impossible to determine the extent of prejudice caused by a particular error, but the nature of the error or the circumstances surrounding the commission of the error suggest that it is very likely to have had a prejudicial effect, the errors are appropriately recognized as "inherently" prejudicial or "presumptively" prejudicial.[3] That describes precisely the nature of the particular type of Rule 24(c) error which occurred in this case.

### 4. The Petitioner's Contentions As To Why The Error Could Not Have Had A Prejudicial Effect Lack Merit

Petitioner sets forth a number of points to argue that the error in this case could not have been prejudicial, much less inherently prejudicial. Pet. Brf. 20-25. For the most part, those points are based upon petitioner's misperception of the nature of the prejudice, as discussed above. Section II.A.2. When the prejudice presented by the Rule 24(c) error which occurred in this case is accurately identified (*i.e.*, influence, not outcome), petitioner's contentions fail. *See* pp. 9-11, *ante*. The other points raised by petitioner to suggest no prejudice could have occurred are also without merit.

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[3] *See, e.g., Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (counsel with conflict); *Davis v. Georgia*, 429 U.S. 122 (1976) (improper exclusion of prospective juror); *Vasquez v. Hillery*, 474 U.S. 254, 263-264 (1986) (racial discrimination in selection of grand jurors); *Turner v. Louisiana*, 379 U.S. at 472-473 (improper presence of deputy sheriffs with deliberating jurors).

Petitioner asserts that there could have been no prejudice because the unauthorized persons were just as likely to favor acquittal as conviction and that respondents could have only been helped by a larger jury. (Pet. Brf. 21). Respondents did not have a jury of thirteen or fourteen, they had a jury of twelve. The presence of anyone else destroys the jury's secrecy. Any effect that others had on the deliberations of those persons was improper. Moreover, even if it is true in the abstract that the unauthorized persons may have been just as likely to favor acquittal as conviction, given that respondents were convicted, it is fair to assume that the petitioner, not the respondents, benefitted from the violation of the rule.

Finally, petitioner's suggestion that there could be no prejudice because courts assume that jurors follow their instructions (Pet. Brf. 25, n.10) is inconsistent with case law and common sense reality. *See United States v. Chatman*, 584 F.2d at 1361; *United States v. Beasley*, 464 F.2d at 470. The suggestion is particularly unpersuasive in the present case, since the trial court instructions on the issue were cursory and did not explain what it was the alternates were not to do. *See* p. 13, *ante*.

**5. The Court Of Appeals' Conclusion That The Type Of Rule 24(c) Error Which Occurred In This Case Was Presumptively Prejudicial Is Supported By Federal Decisions Addressing This Type Of Error And Innumerable State Court Decisions**

Petitioner's suggestion that the potential prejudicial effect of the error which occurred here was minimal or non-existent not only reflects a failure to appreciate the



process of jury deliberations and the nature of prejudice, but it flies in the face of the collective experience and shared conclusions of dozens of trial and appellate court judges as well as the wisdom of the drafters of the Federal Criminal Rules.

In addressing Rule 24(c) errors, federal courts have tailored the remedy according to the particular violation. *See e.g., United States v. Rubio*, 727 F.2d 786, 799 (9th Cir. 1983); *United States v. Kaminski*, 692 F.2d at 518; *Leser v. United States*, 358 F.2d at 317; *United States v. Reed*, 790 F.2d at 210. Where Rule 24(c) is violated by permitting the alternates to attend the deliberations, federal courts recognize that the likelihood of prejudice is great. *See, e.g., United States v. Chatman*, 584 F.2d at 1361; *United States v. Beasley*, 464 F.2d at 469.

State courts have also recognized the inherent prejudice in allowing alternates to attend jury deliberations. Many states have rules or statutes similar to Rule 24(c) requiring the discharge of alternate jurors prior to the commencement of deliberations.[4] In the majority of these states, a trial court's failure to adhere to this rule, where that failure includes permitting the alternates to attend the deliberations, requires reversal of a subsequent conviction. As the North Carolina Supreme Court has accurately observed:

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[4] *See, e.g.*, Ark. Code Ann. § 16-30-102(b); Colo. R. Crim. P. 24(c); Fla. Rule Crim. P. 3.280; N.C. G.S. § 9-18; Mass. R. Crim. P. 20(d)(2); N. Mex. R. Crim. P. 38(c); Tenn. Code Ann. § 22-222; Wash. Crim. P. R. 6.5.

> The rule formulated by the overwhelming majority of the decided cases is that the presence of an alternate, either during the entire period of deliberation preceding the verdict, *or* his presence at any time during the *deliberations* of the twelve regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the defendant's counsel consented, or failed to object, to the presence of the alternate.

*State v. Bindyke*, 288 N.C. 608, 220 S.E. 521, 531 (N.C. 1975) (emphasis in the original) (citing cases). The authors of Federal Rule 24(c) were not drafting on a blank slate; rather, they codified the position firmly embraced by most jurisdictions.

The judicial reasoning supporting such a bright line rule have been varied. However different the reasons given by courts in support of the rule, each of the arguments now raised by the petitioner has been rejected by state as well as federal courts. Some state courts have, for example, squarely rejected the argument raised by petitioner here that an increase in the number of jurors is either harmless or constitutional. *See, e.g., Glenn v. State*, 217 Ga. 553, 123 S.E.2d 896 (1962); *Woods v. Commonwealth*, 287 Ky. 312, 152 S.W.2d 997 (1941); *State v. Rowe*, 30 N.C. 115, 226 S.E.2d 231, 232 (1976); *Commonwealth v. Krick*, 164 Pa. Super. 516, 67 A.2d 746 (1949).

Other courts have rooted their stringent enforcement of the rule against presence of alternates during jury deliberations not primarily on the number of participating jurors but rather upon concerns about protecting the



integrity, confidentiality, and sanctity of jury deliberations, weighty concerns that petitioner would have this Court deem wholly inapplicable. *See, e.g., State v. Cuzick*, 85 Wash.2d 146, 530 P.2d 288, 289 (1975) (reversing conviction despite failure to object); *Bindyke*, 220 S.E.2d at 553. Moreover, the petitioner's contention that "[i]t is unrealistic to characterize the alternate jurors as strangers to the jury" because of their prior participation in the trial (Pet. Brf. 9), has been squarely rejected by state courts. An alternate who is present during deliberations is not a juror, and has no solemn civic or moral duty to perform in the exercise of the jurors' expression of the conscience of the community. As the Massachusetts Supreme Judicial Court has held, when alternates "attend jury deliberations they do so as mere strangers." *Commonwealth v. Smith*, 403 Mass. 489, 531 N.E.2d 556, 559 (1988) (*citing State v. Cuzick, supra*). *Accord, Berry v. State*, 298 So.2d 491, 492 (Fla. App. 1974) ("the alternate is a stranger to the deliberations of the jury.") In short, an alternate is "essentially an outsider watching the other members of the panel reach their final decision." *Cuzick*, 530 P.2d at 289. As an outsider, the alternate breaches the secrecy and solemnity of the deliberative process upon which the jury system rests and depends.

Similarly, state courts have recognized that petitioner's suggestion that the presence of the alternates can be disregarded because they were instructed not to "participate" in the deliberations ignores that people effectively communicate with one another in many ways, including non-verbal expression such as gestures, facial expressions and body language. Alternates can participate through "facial expressions, gestures or the like,"

*Berry v. State*, 298 So.2d 491 (Fl. Ct. App. 1974), or "body language." *Smith*, 531 N.E.2d 556, 561 (Mass. 1988).

Moreover, even in the absence of any verbal or non-verbal communication between or among the jurors and alternate jurors, the mere presence of the alternate as an outside observer – especia'ly one uniquely familiar with evidence bearing upon the jurors' deliberative task and also familiar with the jurors themselves – may influence a juror. *Smith*, 531 N.E.2d at 561. As the Washington Supreme Court has stated, an alternate's "presence as one not obligated to express an opinion, not committed to the decision that was ultimately reached, not faced with the awesome responsibility to decide, could not have gone unnoticed by the twelve formally empaneled jurors and may well have affected their willingness to speak and act freely." *Cuzick*, 530 P.2d at 290.

For the foregoing reasons, most courts support the petitioner's position, as stated in its Brief, that Rule 24(c) "does not authorize the [trial] court to follow a different course [even] if the parties agree." Pet. Brf. 10. If the parties cannot affirmatively agree to a violation of the Rule, a failure to object to a Rule violation should not justify a contrary result.

### B. The Court Of Appeals Was Correct In Holding That The Rule 24(c) Violation In This Case Was Plain Error

The purpose of Rule 52(b) is to provide a means to temper, in appropriate cases, the harshness of the traditional rule that an error to which no objection is made in



the trial court may not be recognized by the appellate court. *United States v. Young*, 470 U.S. 1, 15 (1985) ("The plain-error doctrine of Rule 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement.") *United States v. Frady*, 456 U.S. 152, 163 (1982). The ameliorative function of the plain error doctrine and its codification in Rule 52(b) has long been recognized and applied. *Wiborg v. United States*, 163 U.S. 632, 658 (1896) ("And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.") In contrast to this long and established history, the petitioner in this case reads Rule 52(b) as a rule of preclusion, hoping to use it as a source of authority for imposing the same limitations on direct appeal review of unobjected to errors that are currently applicable to collateral challenges of such errors. As discussed in Section I, this case does not present that issue, because respondent Gray's counsel objected to the Rule 24(c) violation. Further, it was not presented in the government's petition for certiorari, so it is not properly before the Court for that reason, either. If this Court does reach the issue of whether the Rule 24(c) violation here was inherently prejudicial, however, the answer is yes.

#### 1. The Court Of Appeals Properly Applied The Plain Error Doctrine Of Rule 52(b) Because The Rule 24(c) Violation Was Inherently Prejudicial

There is no shortage of definitions of plain error. As one commentator has aptly observed, "[c]ourts have endeavored to put a gloss on the rule by defining the kind of error for which they reverse under Rule 52(b).

Thus, it is said that 'plain error' means 'error both obvious and substantial,' or 'serious and manifest errors,' or 'seriously prejudicial error,' or 'grave errors which seriously affect substantial rights of the accused.' Perhaps these attempts to define 'plain error' do not harm, but it is doubtful whether they are of much help." C. Wright, *Federal Practice and Procedure* § 856, at 336-337 (2d ed. 1982 & Supp. 1992) (footnotes and citations omitted); *compare, e.g., United States v. Frady*, 456 U.S. at 163 ("By its terms, recourse may be had to the Rule only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.") *with United States v. Young*, 470 U.S. at 16, n. 14 ("An error, of course, must be more than obvious or readily apparent in order to trigger appellate review under Rule of Criminal Procedure 52(b).")

Ever since *Brasfield v. United States*, 272 U.S. 448, 450 (1926), this Court has recognized that there are times when it is appropriate to apply the plain error doctrine on direct appear even though it is impossible to determine if the error caused specific or actual prejudice to the defendant. That principle is also supported by this Court's decision in *United States v. Atkinson*, 197 U.S. 157, 160 (1936), where the Court stated that a finding of plain error may be based on a finding that an error "seriously affects the fairness, integrity or public reputation of judicial proceedings." Federal courts to the present time continue to recognize this basis for applying the plain error doctrine of Rule 52(b): the Circuit Courts of Appeals reverse convictions due to plain error for errors which are inherently prejudicial, even in the absence of a finding of



specific or actual prejudice. *See, e.g., United States v. Essex*, 734 F.2d 832, 845 (D.C. Cir. 1984); *Government of Virgin Islands v. Romain*, 600 F.2d 435, 437 (3d Cir. 1979); *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978).

The Court of Appeals' decision in this case is right in line with this precedent. The Court correctly found that the error was inherently prejudicial, that it affected a substantial right of the respondents, and concluded that it was appropriate to recognize the error under Rule 52(b). Pet. App. 28a-30a & n.23. Under the authority of *Brasfield* and *Atkinson*, and in accordance with the carefully reasoned opinion in *Essex*, the Court of Appeals' finding of plain error should be affirmed.

### 2. The Court of Appeals' Application Of Rule 52(b) Was Also Proper In This Case Because The Court Determined That The Rule 24(c) Error Had An Unfair Prejudicial Impact On The Jury's Deliberations

In seeking to reverse the Court of Appeals judgment, petitioner assumes that the opinion in *United States v. Young, supra*, silently overruled *Brasfield, Atkinson* and their progeny, and established a new rule that plain error can only be found where it is accompanied with a finding of specific or actual prejudice to the defendant. Pet. Brf. 17-19. *Young* does nothing of the kind. In fact, the opinion in *Young* quoted from *Atkinson* with approval: a finding of plain error is appropriate where the error " 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Young*, 470 U.S. at 15

(quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

It is true that the Court in *Young* noted with approval that "federal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact on the jury's deliberations." *United States v. Young*, 470 U.S. at 16, n.14. That observation does not constitute a holding which overrules prior authority. That is particularly true given the different types of error in *Young* and in this case. *Young* considered improper closing argument by a prosecutor, an error spread over the record, from which a finding of specific or actual prejudice is typically and easily made. The error in this case, in contrast, is within the category of inherently prejudicial errors, which elude a finding of specific or actual prejudice. The opinion in *Young* did not discuss or even consider the appropriate application of the plain error doctrine to such inherently prejudicial errors. *Young*, therefore, does not provide a basis for ruling that the application of the plain error doctrine to the present case was wrong.

Even assuming, however, that *Young* did establish a new universal rule for application of the plain error doctrine to all types of errors, the Court of Appeals' decision still comes within the criteria of *Young*. As noted above, *Young* stated that application of the plain error doctrine entails a finding that the error "had an unfair prejudicial impact on the jury's deliberations." *United States v. Young*, 470 U.S. at 16, n.14.



The Court of Appeals, after examining the specific features of the Rule 24(c) violation which occurred here, concluded that the error was inherently prejudicial and further determined that the nature of the error was such that it must have had an unfair prejudicial impact on the jury's deliberations. As demonstrated above, the court's conclusion that the Rule 24(c) violation which occurred here was presumptively prejudicial is well supported by the record. *See* pp. 11-14, *ante*. The Court of Appeals' application of Rule 52(b) thus fully satisfied the requirements articulated by *Young*.

Petitioner maintains that the Court of Appeals applied Rule 52(b) incorrectly for two reasons. First, petitioner suggests that a finding of "actual" prejudice is necessary for a finding of plain error and the Court of Appeals made no such finding here (Pet. Brf. 19-20) and, second, petitioner suggests that the Court of Appeals adopted a *per se* approach to plain error which *Young* said was inappropriate (Pet. Brf. 16-17). The criticisms miss their mark.

Neither this Court nor any other has ever said that a finding of "actual" prejudice is necessary before Rule 52(b) can be applied to an error. The only authority petitioner sets forth is support of this proposition is *Davis v. United States*, 411 U.S. 233 (1973), which petitioner admits is a decision on collateral attack of a conviction pursuant to 28 U.S.C. § 2255. *See* Pet. Brf. at 19-20. Petitioner nevertheless attempts to gain support from *Davis* by suggesting that the "principle for which it stands is equally applicable to the plain error doctrine." Pet. Brf. 20. This Court has, however, in unmistakable terms, ruled that different standards do and should apply between a

collateral challenge and plain error review. *United States v. Frady*, 456 U.S. at 164 ("By adopting the same standard of review for § 2255 Motions as would be applied on direct appeal, the Court of Appeals accorded no significance whatever to the existence of a final judgment perfected by appeal.") There is no support for applying an actual prejudice standard to plain error review and, as *Frady* explains, it would be unwise for policy reasons to do so.[5]

Nor did the Court of Appeals adopt the *per se* approach to plain error that this Court in *Young* noted "was flawed." *United States v. Young*, 470 U.S. at 16, n.14. As this Court explained in making that statement, "[t]he Court of Appeals held that the prosecutor's improper remarks constituted 'plain error' *solely* because the prosecutor ignored that court's rule prohibiting such responses." *Ibid.* (emphasis added) Hence, the Court of Appeals approach to plain error in *Young* was flawed

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[5] At other points in its brief, petitioner suggests that something less than a finding of actual prejudice may be sufficient to constitute plain error. E.g., Pet. Brf. at 17-18. The only definitional content petitioner can provide to this concept is that it is something more than "non-harmless" error. *E.g.*, Pet. Brf. at 18 ("An error will be found harmless only if a reviewing court has great confidence that the error did not materially affect the verdict. In order to rise to the level of plain error, however, an error must have a more demonstrable effect on the verdict . . . ") Similarly, petitioner cites *Levine v. United States*, 362 U.S. 610, 619 (1960) for the proposition that the showing of prejudice "must be sufficiently impressive to render irrelevant failure to make a timely objection." Pet. Brf. 19. The Court of Appeals' decision meets that standard, as the Court examined the specific features of the Rule 24(c) error which occurred in this case to determine that it necessarily prejudiced the jury's deliberations.



because it did not consider the prejudicial impact of the error at all – it found plain error based on the mere fact that the rule was violated. That is not what the Court of Appeals did in this case. As explained above, the Court carefully examined and considered the specific features of the particular Rule 24(c) error which occurred in this case and, having done so, concluded that it had a prejudicial effect on the jury's deliberations. Pet. App. 28a-29a. While that finding was based on the conclusion that the particular error was inherently prejudicial, the fact remains that the Court of Appeals, in accordance with the requirements of *Young*, applied Rule 52(b) to the particular error in this case because it found that the error had a prejudicial effect.

Under the petitioner's suggested approach, an error which is inherently prejudicial can never amount to plain error. Since inherently prejudicial errors are errors which, by their very nature, are not capable of a finding of specific prejudice or actual prejudice, such errors could never meet the petitioner's test for plain error under Rule 52(b). Thus, some of the most serious errors in the criminal justice system, errors which by their very nature "seriously affect the fairness, integrity, or public reputation of judicial proceedings" (*United States v. Atkinson*, 297 U.S. at 160) could never be corrected on direct appeal through Rule 52(b) even though errors far less serious would still qualify.

This arrangement would be illogical and unfair. It is systemically undesirable because it encourages yet another round of litigation. The defendant whose attorney fails to object to an inherently prejudicial error at trial

(e.g., where the judge has a financial interest in the outcome, *see Tumey v. Ohio*, 273 U.S. 510 (1927), but who is then unable to obtain relief on direct appeal, will always be forced to seek relief through a collateral challenge on ineffective assistance of counsel grounds. While such a defendant will have a solid Sixth Amendment claim under *Strickland v. Washington*, 466 U.S. 668 (1984) (counsel should have objected and the defendant was prejudiced because he or she would have obtained an automatic reversal on appeal if counsel had objected), and the error will ultimately be corrected, such a circuitous means of remedying errors is not desirable from anyone's perspective. The only way to avoid such protracted litigation is to recognize that the Courts of Appeals, in appropriate cases, may find that an inherently prejudicial error is subject to correction on direct appeal pursuant to Rule 52(b) even though no objection was made to the error in the trial court. That is precisely what the Court of Appeals did in this case.

### 3. If This Court Determines That A Finding That An Error Was Inherently Prejudicial Is Insufficient For Plain Error Review Under Rule 52(b), The Case Should Be Remanded For A Determination Of Whether The Prosecution Can Meet Its Burden Of Establishing That The Error Was Harmless Beyond A Reasonable Doubt, Based On The Entire Record

That error occurred here is undisputed. As the petitioner correctly states, "[t]he dispute in this case is over the consequences of that error." Pet. Brf. 10. Petitioner,



as discussed above, argues that a finding that an error was inherently prejudicial is an insufficient basis upon which to invoke the plain error doctrine of Rule 52(b). If the Court agrees with petitioner, and rules that the finding of prejudice necessary for application of Rule 52(b) must be based on an explicit review of the entire record, the Court should remand this case so that the Court of Appeals can review the specific error which occurred here and assess its prejudicial impact in light of the entire record. *See United States v. Young*, 470 U.S. at 30-31 and n.14 (Brennan, J., concurring in part and dissenting in part) ("When we detect legal error in a lower court's application of the plain-error or harmless-error rules, as here, the proper course is to set forth the appropriate standards and remand for further proceedings. We have followed this procedure in countless cases.") (footnote with citations omitted).

A remand for such a determination is particularly appropriate in the present case given the size and scope of the record. The transcript of the trial alone is over 11,000 pages and there are numerous exhibits and pleadings. The government's theory of the case was extraordinarily complex, involving claims of related loan transactions among three different financial institutions in at least three different states with projects in at least two additional states between and among numerous individuals. The Court of Appeals has already had the opportunity to become familiar with that record, as the oral argument lasted more than two hours, the Court ordered supplemental briefing on the facts after the argument, and the Court ultimately reviewed the entire record in sustaining the respondents' sufficiency of the evidence

claims on three different counts of the indictment. Pet. App. 7a-22a.

Nevertheless, whether that review is conducted by the Court of Appeals on remand or by this Court, the burden will be on the prosecution to establish that the error was harmless beyond a reasonable doubt. The error which occurred in this case, the presence and potential influence of unauthorized persons with deliberating jurors, has correctly been recognized to be an error of constitutional proportions. *Parker v. Gladden*, 385 U.S. at 364-365 (Sixth Amendment right to impartial jury and due process violation); *Turner v. Louisiana*, 379 U.S. at 472-473. As Judge Robinson explained in *United States v. Doe, supra*, since the error is constitutional, the prosecution has the burden of establishing that the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. at 24. *See United States v. Doe*, 903 F.2d 16, 26-28 (D.C. Cir. 1990) (prosecutor's improper summation, although not objected to, was constitutional error since it implicated racial prejudice and court then proceeds to prejudice inquiry under *Chapman* standard).

Applying that standard to the present case, the only conclusion which is supported by the record is that the prosecution cannot show that the Rule 24(c) error which occurred here was harmless beyond a reasonable doubt. Indeed, even if the burden of demonstrating prejudice were on the respondents, the record here would still demonstrate sufficient prejudice to qualify as plain error. Although the jury found the respondents guilty on all counts, the government's proof of guilt was anything but overwhelming. Indeed, the jury found guilt on a number of counts where the evidence was legally insufficient. Pet.



App. 7a-22a. There were numerous other errors which contributed to the verdict which were raised on appeal, which the Court of Appeals itself described as "substantial issues . . . " Pet. App. 3a, n.3. The Court of Appeals has already determined in the appeal of two other defendants that the conspiracy count of the indictment was defective under *McNally v. United States*, 483 U.S. 350 (1987) (*see United States v. Hilling*, 863 F.2d 677 (9th Cir. 1988)) and given the modified "Pinkerton" instruction that was given the jury, the *McNally* error infected the remaining counts of the indictment as well.

In light of the tenuous theory of the prosecution, the debatable evidence of guilt, the numerous errors in the trial and the defective indictment, the likely prejudicial impact of the Rule 24(c) error is sufficient to qualify as an error that should be corrected on appeal under Rule 52(b).

### C. Neither Waiver Nor Consent Precluded Plain Error Review

As discussed above, respondent Gray's counsel initially objected to the court's suggestion that the alternates be allowed to sit in on the deliberations. The following day, Gray's counsel remained silent when counsel for another defendant consented to the procedure. J.A. 86, Tr. 10,736. The Court of Appeals concluded that even assuming that the attorney who spoke did so on behalf of all other counsel, that did not preclude the error from being reviewed as plain error. Pet. App. 27a. That ruling is correct and is consistent with established federal law

which holds that even an attorney's ratification or consent to an error does not prevent the error from being recognized as plain error on direct appeal.

The purpose of Rule 52(b) is to provide a means of granting relief on direct appeal from an error in spite of counsel's deficiency in not preventing or objecting to the error. *United States v. Frady*, 456 U.S. at 163. Federal courts have consistently recognized that where an error is sufficiently egregious so as to create the possibility of manifest injustice, thus making it subject to correction on direct appeal under Rule 52(b), it does not matter whether counsel failed to object to the error, ratified the error or consented to the error. *See United States v. Pabisz*, 936 F.2d 80, 83-84 (2d Cir. 1991); *United States v. Aitken*, 755 F.2d 188, 191 (1st Cir. 1985); *United States v. Krosky*, 418 F.2d 65, 66 (6th Cir. 1969) (plain error found even though "[d]efendant's counsel at the conclusion of the charge not only failed to object to any portion of the charge, but affirmatively expressed his agreement with it."). Even where counsel has ratified, approved of, or consented to the error, that does not affect the determination of whether it constitutes plain error under Rule 52(b). *Pabisz*, 936 F.2d at 84 ("In any event, even if defense counsel had ratified the charge, our standard of review would still be plain error.") As one scholar has observed, the reason why the lawyer made a mistake by not objecting to, or by consenting to the error, is not part of plain error review. *See* Resnik, *Tiers*, 57 So. Cal. L. Rev. 837, 917-918 (1984) (comparing process of review between plain error under Rule 52(b) and collateral attack under 28 U.S.C. § 2255). The conduct of respondent Gray's counsel here, even if it can be fairly characterized as



waiver or forfeiture, did not preclude respondent Gray from having the Court of Appeals recognize the error under Rule 52(b).

The Court of Appeals did indicate that if the district court had obtained an on-the-record personal waiver from each of the defendants, the defendants would not have been able to have the Rule 24(c) error recognized on direct appeal, even under the plain error doctrine. Pet. App. 25a-27a. Apparently the Court of Appeals reached this question because prior Ninth Circuit cases had ruled that it is not error to fail to discharge the alternate jurors if the defendant personally consents to the procedure and that personal consent is reflected in the record. Pet. App. 25a *citing United States v. Crisco*, 725 F.2d 1228, 1230 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984); *United States v. Foster*, 711 F.2d 871, 885-86 (9th Cir. 1983), *cert. denied* 465 U.S. 1103 (1984). It is not necessary to resolve whether the Court's concern was well founded (*i.e.*, whether a personal on-the-record waiver from each of the defendants precludes plain error review under Rule 52(b)), since there was no such waiver here.

Unless petitioner can point to something in the record which suggests that respondents personally consented to the error, nothing more needs to be said about this question.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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